OGDEN MURPHY WALLACE PLLC ATTORNEYS AT LAW

206.447.2269
zlell@omwlaw.com

June 13, 2012

Clerk of the Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

Re: Hasit LLC, et al. v. City of Edgewood, Case No. 42842-3-II

Dear Sir:

Please find enclosed a copy of the Appellant City of Edgewood's Opening Brief in the above-captioned case. The City filed a Motion to File an Over-Length Brief on June 4, 2012, which has not yet been ruled upon. However, because the City's Opening Brief is due today, the City files the enclosed over-length brief with the belief that the Motion will be granted and reiterates the substance of that motion.

Very truly yours,

OGDEN MURPHY WALLACE, P.L.L.C.

J. Zachary Lell

JZL
Enclosure
cc: Margaret Archer, GORDON THOMAS (w/encl)
Carolyn Lake, GOODSETIN LAW GROUP (w/encl)

No. 42842-3-II

COURT OF APPEALS,
DIVISION II,
OF THE STATE OF WASHINGTON

HASIT, LLC, et al.,

Respondents,

v.

CITY OF EDGEWOOD,

Appellant.

OPENING BRIEF OF APPELLANT CITY OF EDGEWOOD

J. Zachary Lell, WSBA #28744
Wayne D. Tanaka, WSBA #6303
Attorneys for Appellant City of Edgewood
OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

LOCAL IMPROVEMENT DISTRICT NO. 1
CHRONOLOGY

1996	City of Edgewood Incorporated
2002	Planning for Sewer and LID Commences
2005	City Establishes Sewer Utility
2007	Interlocal Agreement with Lakehaven Utility District for Operations and Treatment [January 23, 2007]
2007	Department of Ecology Approves City General Sewer Plan and City Adopts by Ordinance 07-0298 [December 11, 2007]
2008	Petitions for LID Received July 2008 From 81 Parcels Representing > 70% of LID Area
2008	Council Adopts Resolution 08-242 (August 12, 2008) Declaring Intent to Form LID No. 1 Public Hearing on Formation Ordinance 08-0306 (October 28, 2008) forms LID No. 1 [No Litigation \Iinitiated Under RCW 35.43.100 to Challenge LID]
2010	Construction Begins in January 2010
2011	Construction Final in March 2011
April 20, 2011	City mails preliminary Notice of Final Assessment Hearing to Landowners
April 26, 2011	Council Adopts Ordinance 11-0361 Appointing Hearing Officer and Scheduling Hearing
May, 12, 2011	City mails and Publishes Formal Notice of Final Assessment Hearing
June 1, 2011	Hearing on Final Assessment Roll
June 30, 2011	Hearing Examiner enters Finding and Recommendation

I. INTRODUCTION

This appeal concerns judicial legislation—a trial court that substituted its judgment for that of the Legislature and generations of Supreme Court precedent. In ruling that the City of Edgewood's local improvement district (LID) notice and hearing procedures were defective, the Superior Court disregarded and substituted its own subjective standard for this controlling authority. The trial court's ruling is without legal foundation and is erroneous as a matter of law.

The "kitchen sink" of arguments raised by the Respondent landowners in this appeal share one overriding commonality: They fail to demonstrate that the City acted arbitrarily and capriciously or otherwise calculated the challenged assessments on a fundamentally wrong basis. In the absence of such a showing, as required by the applicable standard of review, the trial court erred. The Court of Appeals should enforce the law, reverse the Superior Court's decision, and affirm the City's LID assessment roll.

II. ASSIGNMENTS OF ERROR

The City assigns error to the following aspects of the Superior Court's decision, and identifies the issues pertaining to those assignments.

2.1. First Assignment of Error: The Superior Court erred by ruling that the City's final assessment hearing notice was defective.

Issues pertaining to first assignment of error:

2.1.1. The notice procedure for LID hearings is clearly set out in controlling statutes. The City's prehearing notice contained the information and was issued timely in conformance with that law. Was it error for the trial court to apply different notice standards? [Yes]

2.2. Second Assignment of Error: The Superior Court erred by ruling that the City's Hearing Examiner[1] improperly applied the legal presumptions governing the final assessment process and did not act as a neutral fact-finder.

Issues pertaining to second assignment of error:

2.2.1. The LID statutes empower a local Board of Equalization (with or without use of a hearing officer) to hear and determine the final assessments for an LID. Under Supreme Court

---

[1] The Hearing Examiner conducted the hearing on the final assessment roll and made his recommendation to the City Council, sitting as a Board of Equalization. *See* RCW 35.44.080(2). The Council is sometimes referred to herein as the Board of Equalization.

precedent, it is presumed that an improvement is a benefit; that an assessment is no greater than the benefit; that an assessment is equal or ratable to an assessment upon other property similarly situated; and that the assessment is fair. Did the trial court err in disallowing the Board of Equalization's use of these established legal presumptions governing the final assessment process? [Yes]

2.2.2. The court, acting in an appellate capacity, reviews the record developed below by a city board of equalization. Based on the record here, did the trial court err in ruling that the City's Board of Equalization (and its Hearing Examiner) acted in an arbitrary and capricious manner, or contrary to law? [Yes]

2.3. Third Assignment of Error: The Superior Court erred by ruling that the Edgewood City Council afforded the appealing landowners an insufficient opportunity for oral argument.

Issues pertaining to third assignment of error:

2.3.1. **There is no right established in law mandating oral argument.** Was it error for the trial court to require before the City Council an administrative appeal process not found in Washington law? [Yes]

III. STATEMENT OF THE CASE

3.1. Following More than One Hundred Meetings, Workshops and Hearings, Local Improvement District No. 1 Was Formed.

The City of Edgewood was incorporated in 1996 and has historically lacked the sanitary sewer utility infrastructure necessary to accommodate meaningful new land development. (CP 1466, 1477). The vast majority of parcels in Edgewood are served by on-site septic systems, which has created environmental problems and severely limited the development potential of most properties. (CP 1476, 1514-15, 1517). Addressing these concerns through the construction of a municipal sewer system has been a longstanding capital priority of the City.

Formation of Local Improvement District No. 1 was initiated in 2008 when numerous landowners circulated a petition requesting the creation of an LID to finance the sewer infrastructure necessary to support the development of their properties. (CP 1343). In response to the petition, the Edgewood City Council passed a resolution in August 2008 formally declaring the City's intent to form an LID. (CP 1357-73). The City subsequently held a duly-noticed formation hearing on October 14, 2008, to present a detailed overview of the sewer project and to accept

public testimony regarding the proposed local improvement district. (CP 1344).

Following the hearing, the City Council adopted Ordinance No. 08-0306 on October 28, 2008, which formally created Local Improvement District No. 1. (CP 1379-97). The 312-acre district encompasses 161 separate tax parcels that are aggregated along the Meridian Avenue/State Route 161 corridor in Edgewood. (CP 1343, 1384-92, 1466). The formation of the LID was not appealed. (CP 1344).

The 2008 formation hearing on Local Improvement District No. 1 capped an extensive public outreach and participation program to inform and involve local citizens regarding the project. The proposed sewer system was previously discussed at *53 public meetings, 49 City Council meetings and four community workshops* within the City. (CP 1344).

The underlying project involved the installation of approximately 48,000 linear feet of sanitary sewer line, together with associated pump stations, manholes, grinder pumps, side sewers and other necessary facilities. (CP 1347, 1380, 1393-96, 1536). Construction of the sewer system was substantially complete by March 2011. (CP 1345). Due largely to a cost-saving design reconfiguration, the total project cost was $21,238,268—$7,000,000 lower than the original engineer's estimate.

(CP 1345-47, 1358, 1450, 1467). The entire expense of the project is funded by the LID. (CP 1467).

3.2. Appraisal and Assessment Process for Local Improvement District No. 1.

3.2.1. The Macaulay report. In October 2009 the City retained the appraisal firm of Macauley & Associates to prepare an appraisal and special benefit study determining special benefits so that the total sewer project cost could be proportionately assessed to the various parcels within LID No. 1. (CP 1345). The principal appraiser, Robert J. Maccauley, is an MAI-certified professional with over 27 years of market analysis and real estate appraisal experience with a particular emphasis on local improvement districts. (CP 1561-62). Macaulay & Associates began the appraisal process in December 2010 and submitted its 152-page "Final Special Benefit/Proportionate Assessment Study" ("Macaulay report") on May 10, 2011. (CP 1347, 1464-1626).

The Macaulay report estimated the current market value of each assessable parcel both without and with the LID project completed. These appraisals were based upon general factors relevant to land valuation—i.e., demographic information, local land use policies and trends, growth forecasts and employment statistics, as well as parcel-

specific information "such as highest and best use, zoning and physical characteristics including parcel size, configuration, road frontage, topography, available utilities, usable area and existing improvements." (CP 1537). Macaulay also conducted field inspections of the subject parcels. (CP 1465). Background information regarding parcel sizes, wetlands and other unusable areas was provided by City staff. (CP 1479, 1533).

Macaulay & Associates utilized a "mass appraisal" approach to the valuation process and accordingly did not prepare separate parcel appraisal reports for each individual property within the LID. The report does, however, include market value conclusions for each parcel both without and with the new sewer system installed. (CP 1482-87). Where appropriate, Macaulay's methodology utilized valuation approaches consisting of the "income" approach, the "sales comparison" approach (i.e., identifying and comparing sales listing of similar properties), and the "cost" approach. In appraising the value of the affected parcels, the Macaulay report was influenced by recent amendments to the City's land use regulations that significantly enhanced the development potential of properties within the LID. (CP 1465-66).

Macaulay's appraisal methodology was summarized by the report:

This is a mass appraisal report prepared in accordance with requirements set forth under "Standard 6: Mass Appraisal, Development and Reporting" of the Uniform Standards of Professional Appraisal Practice (USPAP) of the Appraisal Institute and, as such, it utilizes limited appraisal valuation techniques. Separate market value estimates are made for each parcel within the LID boundary. The first estimate is of market value without the project and the second is with the project assumed completed as of the same time frame. The increase in values, if any, is the special benefit accruing to that parcel due to the project.

In order to estimate the costs which a typical property owner/developer/investor would incur when developing or redeveloping property in the absence of the project, information obtained from comparable sales, planning departments in various cities and knowledgeable local professionals was reviewed. Recent sales of comparable commercial, multi-family and single-family residential land, together with local commercial and apartment lease rates, were researched. Supply and demand information, as well as vacancy and absorption rates pertaining to the various local real estate markets, was considered. Also, the developers of projects proposed in the greater subject vicinity were interviewed to obtain (when possible) perspectives on the LID project and its influence on property values.

> Dividing the total recommended final assessment by the total estimated special benefit for a project yields a cost/benefit ratio which, in order for an LID project to be feasible, is typically a number less than one. Multiplying the individual special benefit amounts for the affected parcels by this constant ratio results in recommended proportionate assessments to each parcel.
>
> The estimated total project cost is $21,238,268, of which 100% is to be financed by the LID. The total estimated special benefit to affected property is $28,818,000. Dividing the total project cost by the total estimated special benefit yields a cost/benefit ratio of 74+%. In other words, each parcel receives one dollar in special benefit for each $0.74+ of LID assessment. The spreadsheet detailing significant facts and figures for the affected parcels (listed by map number, one or more of which may comprise a parcel) is located near the beginning of this report. The aggregate special benefit, total project cost and assessment/benefit ratio presented above results from analysis and compilation of the data in the spreadsheet.

(CP 1529-30).

The Macaulay report thus concluded that the total special benefit of the sewer project to all affected properties within the LID was $28,818,00. (CP 1467). Dividing the total project cost ($21,238,268) by this figure yielded a cost/benefit ratio of 74 percent—i.e., each parcel

receives one dollar of special benefit for each $0.74 of LID assessment. (CP 1467). The report maintained proportionality among the special benefit estimates and treated properties consistently to most accurately reflect the special benefit indicated by the market; parcels were generally grouped based upon their respective locations and zoning designations, with a range of accrued special benefits provided for each category. (CP 1480).

Copies of the Macaulay report were made available for public inspection and copying immediately after the City's received the report on May 10, 2011. (CP 1348).

3.2.2. June 1, 2011 public hearing and Hearing Examiner report. In April 2011, the Edgewood City Council adopted Ordinance No. 11-0361, designating City of Edgewood Hearing Examiner Stephen Causseaux, Jr. to conduct the public hearing on the final assessment roll for LID No. 1. (CP 1444-46). The ordinance scheduled the hearing for June 1, 2011, and established procedures governing the appeal process and the City Council's consideration of the assessment roll. (CP 1444-46).

Although not required by statute, the City mailed a preliminary letter to landowners on April 20, 2011, notifying them of the June 1

hearing date, generally describing the assessment process, and explaining the applicable protest and appeal procedures and timeframes. (CP 216-17). Formal statutory notices of the hearing were subsequently mailed to affected landowners on May 12, 2011, and published twice in the local newspaper. (CP 1452-1461). Together with the mailed hearing notices, the City included for each landowner's reference a copy of Ordinance No. 11-0361 and an anticipated assessment payment schedule. (CP 1452-1461).

The public hearing for the final assessment roll was held on June 1, 2011. (CP 52). The Hearing Examiner accepted the City's staff report and heard presentations from various staff members and consultants regarding the history, design, construction and financing of the sewer project. (CP 2114-2134). The Examiner also accepted testimony from or on behalf of 16 landowners who had filed timely objections to their respective assessments. (CP 2134-2227). No time limitations were imposed upon any speaker's presentation, and landowners were afforded an opportunity to cross-examine the City's witnesses. (CP 2134-2227). None of the landowners presented live testimony from appraisal experts to challenge the content or methodology of the Macaulay report. (CP 66).

At the conclusion of the hearing, the Hearing Examiner agreed to keep the record open for an additional two week period to submit written responses and closing arguments. (CP 2257-58). Utilizing this opportunity, additional correspondence was subsequently submitted by various landowners, as well as by the City. (CP 1004-1088). Included with the City's submittal was a supplemental letter from Macaulay & Associates responding to several of the landowners' arguments. (CP 1083-88). Macaulay ultimately recommended reductions of the original assessments for three parcels, including one owned by Respondent Stokes Family, LLC. (CP 1084-87).

The Hearing Examiner issued his Report and Recommendation to the City Council on June 30, 2011. (CP 53-67). After summarizing the landowners' various objections and reciting the applicable standard of review, the Hearing Examiner concluded that none of the protesting landowners had presented evidence sufficient to challenge the assessments recommended by the Macaulay report. (CP 66). The Examiner ultimately recommended that the Edgewood City Council reject all of the landowners' protests except for the reductions proposed in Macaulay's supplemental analysis. (CP 67).

3.2.3. City Council appeal hearing and adoption of Ordinance No. 11-0366. Immediately after receiving the Hearing Examiner's report, the City scheduled a hearing before the Edgewood City Council for July 19, 2011, to confirm the assessment roll for LID No. 1 by ordinance and to hear any appeals from landowners seeking to challenge the Hearing Examiner's recommendations. (CP 1100). The City mailed a Notice of Appeal Hearing on July 1, 2011, notifying all landowners with standing of the hearing date as well as the deadline and procedures for filing any written appeals. (CP 1100-06). In previously adopting an appeal framework for the final assessment process under Ordinance No. 11-0361, the Edgewood City Council had reserved its right to decide at a later point whether to accept oral argument from the parties. (CP 1445). The City Council ultimately allowed each appellant to present oral argument at the July 19th hearing, but—in accordance with Ordinance No. 11-0361—limited these presentations to factual information already contained within the record. (CP 2268-69).

The appeal hearing was conducted before the City Council on July 19, 2011. Ten landowners, including each of the Respondents, submitted written appeals to the City Council and presented oral argument at the hearing either directly or through their respective attorneys. (CP 1113-

1288, 2271-93). After deliberation and an unsuccessful first vote, the four participating Council Members voted unanimously to sustain the appeal and reduce the assessment of one landowner. (CP 2306-23). The Council denied the other appeals and confirmed the assessment roll for LID No. 1 as recommended by the Hearing Examiner. (CP 2322-23). The City Council's decision was effectuated by the adopted of Ordinance No. 11-0366. (CP 1311-1336).

3.3. Judicial Appeals and Superior Court Decision.

The various Respondent landowners commenced the instant case by filing separate notices of appeal in Pierce County Superior Court.[2] The cases were eventually consolidated. Following briefing, a hearing on the merits and an oral ruling, the Superior Court entered its Findings of Fact, Conclusions of Law and Decision on Appeal on November 10, 2011. (CP 2837-46). The court did not reach the merits of the landowners' assessment challenges or address the substance of the City's appraisal and special benefit methodology. Instead, the trial court ruled that the notice of the City's final assessment hearing was inadequate, that the City's Hearing Examiner had misapplied the legal standards governing the

---

[2] A judicial appeal was also filed by Hasit LLC, which was voluntarily dismissed from the instant matter by stipulated order on April 20, 2012.

assessment process, and that the appealing landowners had been afforded an insufficient opportunity for oral argument during the City Council proceeding. (CP 2843-44). The court ordered the City to conduct a remanded final assessment hearing subject to several procedural requirements. (CP 2844-45).[3]

The City timely filed its Notice of Appeal challenging the Superior Court's decision on November 23, 2011. (CP 2869-82).

IV. SUMMARY OF ARGUMENT

A longstanding body of Washington law prescribes the procedures and substantive standards governing the local improvement final assessment process. The administrative record in the instant matter demonstrates the City of Edgewood's compliance with each of these requirements. State law is equally clear regarding the evidentiary standard for successfully challenging a local assessment—a standard that the Superior Court wholly disregarded below and which none of the Respondent landowners can satisfy. As a matter of law, the final assessment roll for LID No.1 should be affirmed by this Court.

---

[3] The Superior Court limited its remand order to those landowners within the LID who had filed timely judicial appeals. (CP 2844). The court subsequently denied a motion for reconsideration filed by Respondents Docken *et al,* as well as a post-judgment motion for intervention from a landowner who had not originally appealed its assessment. (CP 2968-69).

V. ARGUMENT

5.1. Standard of Review.

5.1.1. Case Heard On the Record Before the Board of Equalization. The Court of Appeals stands in the same position of the trial court and limits its reviews to the record of administrative proceedings before the City. *Abbenhaus*, 89 Wn.2d at 859. The Superior Court's decision, including its findings and conclusions, is not entitled to any deference on appeal, and the Respondent landowners bear the exclusive burden of persuasion before this Court. *See* General Order 2010- 1 of Division II, *In Re: Modified Procedures For Appeals Under The Administrative Procedures Act, Chapter 34.05, and Appeals Under the Land Use Petition Act, Chapter 36.70C RCW* (Washington Court of Appeals, March 23, 2010)).

5.1.2. The Court of Appeals must deny the appeals unless it finds that the challenged assessments were fundamentally wrong or that the City acted arbitrarily and capriciously. The standard of review in this appeal is extraordinarily demanding: The Court of Appeals is "required to confirm the assessment roll unless the assessment was founded upon a fundamentally wrong basis and/or the decision of the City was arbitrary and capricious." *In re Indian Trail*

Trunk Sewer, 35 Wn. App. 840, 841, 670 P.2d 675 (1983). An assessment is deemed to be founded upon a fundamentally wrong basis only if the City's methodology was so flawed that it necessitates nullification of the entire assessment roll as opposed to merely a modification of the assessment levied against a particular parcel. *Abbenhaus City of Yakima*, 89 Wn.2d 855, 859, 576 P.2d 888 (1978); *Kusky v. City of Goldendale*, 85 Wn. App. 493, 500, 933 P.2d 430 (1997). An action is arbitrary and capricious if it was made willfully and unreasonably, without regard or consideration of facts or circumstances. Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may ultimately believe it to be erroneous. *Abbenhaus*, 89 Wn.2d. at 858-59.

Notably, the Superior Court did not acknowledge—much less apply—this standard in rendering its decision below. (CP 2837-46).

5.1.3. The Respondents cannot sustain their burden. This highly deferential standard of review is dispositive of the instant appeal. The exceptionally lengthy, detailed and thorough appraisal analysis prepared by an undisputedly credentialed consultant (Macaulay & Associates) is, in and of itself, sufficient to support to the City's confirmation of the LID No. 1 assessment roll. (CP 1464-1626). There is

no evidence that the analysis did not comply with the Uniform Standards of Appraisal Practice as provided by Chapter 18.140 RCW.[4] The Court will recognize that in the face of competing opinion testimony, the fact finder—not the reviewing court—determines the credibility and application of an otherwise qualified opinion. *See, e.g., Abbenhaus*, 89 Wn.2d. at 858-59. Here, there were not even competing opinions. The Respondents do not, and cannot, cite to any record evidence demonstrating that the City acted willfully and unreasonably in disregard of relevant facts and circumstances. They are thus unable to demonstrate that the City's assessment approach was founded upon a fundamentally wrong basis or that the City Council sitting as a Board of Adjustment acted arbitrarily or capriciously in adopting Ordinance No. 11-0366. Accordingly, their appeals should be denied.

5.2. The City's Procedure in Confirming the Final Assessment Roll for LID No. 1 Was Correct.

The Washington Legislature has established a precise schedule and timeframe for the LID final assessment process. *See* Chapter 35.44 RCW. Washington courts have repeatedly affirmed that these timeframes satisfy

---

[4] Although the Respondents baldly allege numerous violations of the Uniform Standards, *see, e.g., Stokes/Rempel Opening Brief at 44-46*, they present no actual evidence—much less any expert testimony—to support their assertions.

relevant constitutional standards, and have rejected arguments that landowners are entitled to notice greater than specified by the relevant statutes. *See, e.g., Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 235 n.5, 119 P.3d 325 (2005) (citing cases).

It is undisputed in this case that the City's procedures complied fully with all applicable statutory requirements. When the City modified the standard notices, it was for the purpose of providing the LID participants with greater notice and opportunity to be heard than otherwise required by law. Respondents' various procedural arguments are without merit, and the trial simply court ignored the law governing this issue, apparently believing it was better positioned than the Legislature to make such determinations.

5.2.1. The City's Notice of the Final Assessment Hearing Fully Complied with Law. The core of the Superior Court's decision was the court's conclusion that the City had provided landowners with inadequate notice of the June 1, 2011, final assessment hearing. (CP 2843-44). This determination is erroneous as a matter of law.

5.2.1.1. The content of the hearing notice was correct. Notice for the public hearing on a final assessment roll is governed by RCW 35.44.080, which provides in its entirety as follows:

> **35.44.080 Assessment Roll—Notice of Hearing.**
>
> The notice of hearing upon the assessment roll shall specify the time and place of hearing and shall notify all persons who may desire to object thereto;
>
> (1) To make their objections in writing and to file them with the city or town clerk at or prior to the date fixed for the hearing;
>
> (2) That at the time and place fixed and at times to which the hearing may be adjourned, the council will sit as a board of equalization for the purpose of considering the roll; and
>
> (3) That at the hearing the council or committee or officer will consider the objections made and will correct, revise, raise, lower, change, or modify the roll or any part thereof or set aside the roll and order the assessment to be made de novo.
>
> Following the hearing the council shall confirm the roll by ordinance.

RCW 35.44.080. The Respondents do not, and cannot, dispute that the City's May 12, 2011, hearing notice contains all of the information required by this statute. (CP 1453). And although not legally required, the City also included with its mailed notice an explanatory cover letter, a courtesy copy of City Ordinance No. 11-0361 and an anticipated assessment payment schedule. (CP 1452-61).

The record demonstrates that the recommended assessment for each recipient's parcel was enclosed with the City's May 12 notice packet. (CP 1452, 1460, 2121). Respondents' contrary assertion is a misrepresentation to the Court. *Docken Opening Brief at 22-23.* They likewise erroneously contend that a statement of the estimated benefit to each parcel is required in this context. In this regard, Respondents' reliance upon RCW 35.43.130 and *Peoples Nat. Bank of Washington v. City of Anacortes*, 44 Wn. App. 262, 721 P.2d 1003 (1986) is misplaced. That statute, and the case applying the statute, both concern a completely different notice: the notice for LID formation hearings. That notice is wholly irrelevant to the final assessment process, the standards for which are codified at RCW 35.44.080-.090. This is one of many arguments that demonstrate the Respondents' efforts to mislead the Court. The Court should not countenance such conduct and should reject the invitation to legislate.

5.2.1.2. The City's notice of the final assessment hearing was timely. The timing of the City's prehearing notice was also fully compliant with State law. Pursuant to RCW 35.44.090, notice of a final assessment hearing must be mailed 15 days prior to the hearing date. The City's notice was mailed on May 12,

2011—a full 20 days before the June 1st public hearing. (CP 1452). The notice was also published in the City's official newspaper for two consecutive weeks in accordance with the above statute. (CP 1461-62). And although not legally required, the City also took the extraordinary additional step of mailing a preliminary letter to landowners on April 20, 2010—three weeks before the May 12 notice and 41 days in advance of the hearing itself—notifying them of the hearing date, generally describing the assessment process, and explaining the applicable protest and appeal procedures and timeframes. (CP 216-17). The trial court clearly erred in applying different standards.

Beyond the formal notice, the City had been working with the affected landowners for a decade. There were over a hundred meetings, hearings, workshops and related communications over those years. (CP 1344). It is absurd for any landowner to assert that there was no knowledge of the LID and its final assessment roll process. In light of the record, the Respondents cannot credibly argue that they lacked a meaningful opportunity to prepare for the final assessment hearing.

The City sent landowners revised notice materials on May 16 and May 17, 2011. (CP 690-700); *Docken Opening Brief at 23-24.* But the revised materials concerned information—i.e., an "Anticipated

Assessment Payment Schedule" and legal descriptions of some affected parcels—that was not required by the relevant statutes and which the City had included within the original notice packet purely as a courtesy. (CP 1213, 1225-26); *see* RCW 35.44.080-.090. This is laudable, and does not provide a basis for legal challenge. *See, Docken Opening Brief at 23-24.* Clearly no prejudice to any party resulted from this claimed "error." The City's supplemental mailings did not render the May 12, 2011, prehearing notice untimely or otherwise defective.

5.2.2 The City provided all relevant information upon request. The City also timely honored all requests for information submitted by LID participants prior to the June 1, 2011 final assessment hearing; the Respondents' assertions to the contrary are simply wrong. *Docken Opening Brief at 24-25.* The May 12, 2011 hearing notice specifically invited landowners to inspect and obtain copies of the special benefit study and all other pertinent material. (CP 1460). The uncontested record demonstrates that the City did provide this information for public review, that several landowners took advantage of the opportunity, and that they received the requested materials without delay. (CP 1348).[5]

---

[5] The Court of Appeals should flatly reject the Respondents' contention that the alleged deficiencies in the City's hearing notice created a "jurisdictional defect"

warranting invalidation of the entire assessment roll for LID No. 1. *Docken Opening Brief at 13-22.* As explained supra, the timing and content of the City's hearing notice were fully compliant with all relevant statutory requirements There was no defect in the City's hearing process, much less a "jurisdictional" one.

The Respondents' argument also fails on its merits. It is well-established that a reviewing court's final judgment in a local improvement district final assessment appeal is confined to the landowners within the LID who timely appealed their assessments. *See* RCW 35.44.250 (limiting court's ruling to adjusting the challenged assessments "as it affects the property of the appellant"). Even if a landowner prevails on appeal, "the court is limited to nullification or modification only of the particular property assessment before it." *Kusky v. City of Goldendale,* 85 Wn. App. 493, 500, 933 P.2d 430 (1997). This constraint applies even where an appealing landowner demonstrates that the municipality's error in confirming the challenged assessment roll "is so fundamental as to necessitate a nullification of the entire LID, as opposed to a modification of the assessment to a particular property." *Abbenhaus v. City of Yakima,* 89 Wn.2d 855, 859, 576 P.2d 888 (1978). The assessments of landowners who fail to timely appeal "cannot in any manner be contested or questioned in any proceeding by any person". RCW 35.44.190 (emphasis added). Collectively, this statutory framework preserves the confirmed assessments of landowners who do not protest and appeal within the timeframes established by Chapter 35.44 RCW, and it limits any judicial relief to the assessments of the appellants themselves. The Respondents' attempt to void the entire assessment roll for Local Improvement District No. 1 fails under this unambiguous authority.

Respondents' reliance upon *Tiffany Family Trust Corp. v. City of Kent* is misplaced. In *Tiffany*, the Washington Supreme Court actually rejected a landowner's attempt to avoid the statutory protest and appeal deadlines for challenging a final assessment. *Tiffany Family Trust Corp. v. City of Kent,* 155 Wn.2d 225, 233-38, 241, 119 P.3d 325 (2005). The Supreme Court noted that "courts have strictly construed what constitutes a jurisdictional defect", and it refused to find such a deficiency under the facts of that case. *Id.* at 236. Nothing in that case stands for the proposition that a purported jurisdictional defect allows a party to invalidate the previously-unchallenged assessments of other landowners. *Pratt v. Water District No. ,* 58 Wn.2d 420, 424, 363 P.2d 816 (1961), is likewise unhelpful to Respondents. The Supreme Court there acknowledged that even in a successful jurisdictional challenge, the judicial remedy is limited to invalidation of the "assessments upon appellants' property" — not the assessments of the other LID participants. *Id.* at 426 (emphasis added).

5.2.3. Publication of City Ordinances Have Nothing to Do with the LID Hearings. But, the Ordinance Publications Complied with the Controlling Statutes.

As authorized by RCW 35A.12.160, the City published a summary text of the City's zoning and procedural ordinances. Those ordinances are wholly irrelevant to either the procedural or substantive issues involved in a final assessment roll proceeding. The exclusive bases upon which an approved final assessment roll may be legally challenged are that the City's assessments were made on a fundamentally wrong basis or that the City acted arbitrarily and capriciously in confirming the roll. *See, e.g., Abbenhaus*, 89 Wn.2d at 858-59. Respondents do not—and cannot—cite any relevant authority suggesting that a final assessment may be invalidated based upon alleged ordinance publication defects relating to the City's zoning code.

The Respondents' arguments also fail on their merits. First, the ordinances in question each contained a summary publication statement that essentially tracks the applicable statute. RCW 35A.12.160 provides that "[w]hen the city publishes a summary, the publication shall include a statement that the full text of the ordinance will be mailed upon request." The summary statement of the City enactments at issue here stated that

"[t]he full text of the Ordinance is available at Edgewood City Hall", and provided both a mailing address and phone number by which interested citizens could request a copy. (*See, e.g.*, CP 128, 1448). This language is functionally identical to the statutory text.

Second, even if the City had in fact materially deviated from the summary publication text requirement under RCW 35A.12.160, the very next sentence of that statute clarifies that "[a]n inadvertent mistake or omission in publishing the text or a summary of the content of an ordinance shall not render the ordinance invalid." RCW 35A.12.160 (emphasis added). RCW 35A.21.010 likewise provides that form defects do not affect the validity of an ordinance as long as the purpose, intent and substantive provisions of the ordinance are clearly expressed and the ordinance was enacted in substantial compliance with applicable procedures.

Respondents attempt to avoid the plain import of these statutes by alleging that the City has provided no evidence that the ordinance summary resulted from an "inadvertent mistake" within the meaning of RCW 35A.12.160. *Docken Opening Brief at 27-28.* This assertion is ultimately an attempt to reverse the Respondents' own burden of proof. It is incumbent upon the party challenging the validity of an ordinance—not

the City—to supply supporting evidence. *See, e.g., City of Wenatchee v. Owens*, 145 Wn. App. 196, 202-03, 185 P.3d 1218 (2008). The Respondents have offered none, and there is no basis for their challenge. The City complied fully with the controlling statutes

5.2.4. RCW 35.44.040 specifically authorizes use of a hearing officer. The City's delegation of authority to the Hearing Examiner was correct. The City's delegation of power to the Hearing Examiner under Ordinance No. 11-0361 fully complied with state law. The City Council's authority to designate a hearing officer to oversee the final assessment hearing for an LID is governed by RCW 35.44.070, which provides in relevant part:

> The council or other legislative authority shall. . . . fix a date for a hearing thereon before such legislative authority or may direct that the hearing shall be held before a committee thereof or the legislative authority of any city or town may designate an officer to conduct such hearings. The committee or officer designated shall hold a hearing on the assessment roll and consider all objections filed following which the committee or officer shall make recommendations to such legislative authority which shall either adopt or reject the recommendations of the committee or officer.

RCW 35.44.070 (emphasis supplied).

A separate statute requires the hearing notice for a final assessment proceeding to formally acknowledge the board of equalization's ability to "correct, revise, raise, lower, change or modify" the assessments. See RCW 35.44.080(3). That acknowledgement was included in the City's notice. However, RCW 35.44.070 imposes no such requirement upon the ordinance appointing the officer in the first instance. And, notably, the raising of any assessment would trigger another hearing, including full notice. RCW 35.44.120. The City was within its authority to limit the hearing officer in this regard.

The Respondents' claim regarding the City Board of Equalization's use of a hearing officer has no legal foundation. *Docken Opening Brief* at 29-33. The governing statute authorizes the City Council to delegate the responsibility for conducting a final assessment proceeding to a hearing officer. By its terms, Ordinance No. 11-0361 authorized the Edgewood Hearing Examiner "to conduct the hearing as permitted by RCW 35.44.070". (CP 1444). The Examiner himself accurately acknowledged his statutory options regarding the assessments. (CP 56). The City's delegation of authority to the Hearing Examiner was neither contradictory nor incomplete. It is the City Council that ultimately considers the hearing officer's recommendations and serves as the Board

of Equalization. There was no evidence or argument presented at any stage of the proceedings that an assessment should be raised. There were likewise no constraints on the presentation of such evidence. Under the statute, and in light of the record, Respondents' claim has no merit and must be rejected by the Court.

5.2.5. The Hearing Examiner properly applied the relevant presumptions. Whether and to what extent a particular parcel has been specially benefited by an improvement is a question of fact to be proven by expert testimony. *Kusky*, 85 Wn. App. at 499; *Bellevue Associates v. City of Bellevue*, 108 Wn.2d 671, 676-77, 741 P.2d 993 (1987). However, it is presumed that an LID assessment is proper and that the City acted correctly in levying it. *See, e.g., Bellevue Associates*, 108 Wn. App. at 676-77; *Kusky*, 85 Wn. App. at 498. Specifically, the following assumptions apply with respect to the assessment process:

> It is presumed that an improvement is a benefit; that an assessment is no greater than the benefit; that an assessment is equal or ratable to an assessment upon other property similarly situated; and that the assessment is fair.

Abbenhaus, 89 Wn.2d at 861 (quoting Trautman, Assessments in Washington, 40 *Wash. L.Rev.* 100, 118 (1965)). The Hearing Examiner

acknowledged and accurately summarized these principles in his Report and Recommendation to the Edgewood City Council. (CP 56).

To overcome these presumptions, the party challenging an assessment must present competent expert appraisal evidence demonstrating that the subject property is not benefited by the improvement or challenging the amount of the assessment. *Indian Trail.*, 35 Wn. App. at 842-43; *Cammack v. City of Port Angeles*, 15 Wn. App. 188, 197, 548 P.2d 571 (1976). The opinion of any such expert must be supported by an adequate foundation and based upon facts rather than speculation or conjecture. *Time Oil Co. v. City of Port Angeles*, 42 Wn. App. 473, 489-80, 712 P.2d 311 (1985). If—and only if—such evidence is submitted, the burden shifts to the City to prove that the property is in fact benefited. *Bellevue Plaza Inc. v. City of Bellevue*, 121 Wn.2d 397, 403-04, 851 P.2d 662 (1993); *Indian Trail*, 35 Wn. App. at 842-43. Finally, a landowner challenging an assessment has the burden to prove, by competent evidence, that the assessment was founded on a fundamentally wrong basis or was imposed arbitrarily or capriciously. *Kusky*, 85 Wn. App. at 500.

5.2.5.1. The presumptions and burden of proof apply at both the administrative and judicial levels. The Respondents

contend that the presumptions and burden of proof recited above apply only to a court's review of a challenged assessment, and that the Edgewood Hearing Examiner erred by applying these principles during the administrative process below. *Docken Opening Brief at 33-35; Stokes/Rempel Opening Brief at 10-11.* This assertion is patently incorrect. Washington caselaw consistently provides that these presumptions apply automatically throughout the entire proceedings—both administrative and judicial—related to the LID assessment process. *See, e.g., Indian Trail*, 35 Wn. App. at 842-44 [6]; *Abbenhaus*, 89 Wn.2d at 861 (noting that "[a]ppellants' claims of unfairness made before the City Council, without supporting evidence of appraisal values and benefits, are inadequate to overcome these presumptions") (emphasis added).

---

[6] "The City is correct that it has the benefit of the *Abbenhaus* presumptions, including the presumption the City acted legally and properly. *Accord, In re Local Imp.* 6097, 52 Wn.2d 330, 324 P.2d 1078 (1958); *Cammack*, 15 Wn. App at 197. Because of these presumptions, the burden of going forward with evidence rebutting those presumptions rests upon those attacking the assessment. *In re Local Imp.* 6097, *supra,* at 334. Whether property is specially benefited by the improvement and the extent of the benefit are questions of fact, *see, e.g., In re Jones*, 52 Wn.2d 143,146, 324 P.2d 259 (1958); *Hargreaves v. Mukilteo Water Dist.*, 43 Wn.2d 326, 333, 261 P.2d 122 (1953), to be proved by expert testimony. *See Cammack, supra,* at 197. The degree of special benefit, if any, occurring to property by reason of a local improvement is the difference between the fair market value of the property immediately before and after the improvement. Trautman, ASSESSMENTS IN WASHINGTON, 40 Wash. L. Rev. 100, 118 (1965); *Ion re Local Imp. 6097, supra*, at 333; *In re Scmitz*, 44Wn.2d 429, 434, 268 P.2d 436 (1954)."

More fundamentally, the presumptions necessarily apply throughout the administrative process as a matter of common sense. Judicial review of an LID assessment challenge is based exclusively upon the record created during the administrative proceedings and cannot involve any additional evidence. *Abbenaus*, 89 Wn.2d at 859. Thus, in order to rebut the initial presumptions of validity, and/or for the City to respond to any such rebuttal, the information at issue must be submitted into the record during the administrative process. There would be no need for or opportunity to rebut the initial presumption if—as the Respondents contend—the presumptions apply only at the judicial level. *See, e.g., Abbenaus*, 89 Wn.2d at 860 (city must have opportunity during administrative proceedings to consider and respond to relevant landowner information). The Respondents cite no contrary Washington authority for their unsupported theory. This Court should follow existing law and reject Respondents' claims.

5.2.5.2. The Hearing Examiner correctly applied the presumptions and burden of proof. The City recognizes that the LID assessment presumptions do not, in and of themselves, constitute evidence. *See, e.g., Indian Trail*, 35 Wn. App. at 843; *Docken Opening Brief at 33.* But Respondents mischaracterize the City's assessment

process by contending that the Hearing Examiner refused to even consider any evidence submitted by landowners that was not supported by the live testimony of an appraisal expert at the June 1, 2011, hearing. *Stokes/Rempel Opening Brief at 31-32.* The Superior Court accepted this wrongful premise, concluding that "the Hearing Examiner improperly treated the presumptions in favor of the City as conclusive, when in fact they were subject to being rebutted." (CP 2879). The record before the City (and this Court) demonstrates the error of that position.

The Hearing Examiner did not disregard any evidence or testimony. He carefully weighed all of the evidence that had been submitted and ultimately concluded—correctly—that the protesting landowners had failed to demonstrate that the City's own appraisal methodology was "fundamentally wrong" as required by the applicable legal standard. (CP 66-67). As the hearing officer and initial fact-finder for the final assessment proceeding, the Examiner clearly had this discretion. *Cf. Friends of Cedar Park Neighborhood v. City of Seattle*, 156 Wn. App. 633, 641-42, 234 P.3d 214 (2010) (acknowledging hearing examiner's authority to assess credibility of witnesses and weigh competing inferences). The Board of Equalization was within its authority to accept those findings.

The record clearly supports this conclusion. As the Examiner properly acknowledged, the Macaulay report was a detailed, formal appraisal that included before-and-after valuations of the affected parcels, and the City's appraiser both testified and was subject to extensive cross-examination at the final assessment hearing. (CP 66-67, 1464-1626). By contrast, none of the Respondent landowners submitted appraisals with before-and-after values, and no landowner presented live expert testimony at the hearing. (CP 67).[7] They likewise presented no other persuasive basis to dispute Macaulay's testimony. The Hearing Examiner correctly determined that these omissions fatally undermined the landowners' challenges. (CP 66-67).

The caselaw examples cited by the Examiner accurately illustrate this point. *Compare Kusky*, 85 Wn. App. at 499-500 (upholding challenge to assessment where landowner's appraisal expert testified in person and city simply relied upon presumption in lieu of presenting expert testimony), *with Time Oil*, 42 Wn. App. at 489-80 (rejecting challenge to assessment where landowner presented testimony of a single witness who failed to establish before-and-after values). *See also, Cammack v. City of*

[7] The Uniform Standards for Professional Appraisal Practice (USPAP), at Chapter 18.140 RCW, require that standards are followed before an appraisal opinion is given. No Respondent presented a qualified opinion to counter the Macaulay appraisal opinion.

Port Angeles, 15 Wn. App. 188, 197, 548 P.2d 571 (1976) (emphasizing need for landowners to present expert witness testimony at assessment hearing). No Washington authority demonstrates that this approach constitutes "fundamental" error as required by the applicable standard of review.

Contrary to the Respondents' assertions, the Hearing Examiner likewise did not impose a "heightened" burden of proof on the protesting landowners such as to render the City's hearing notice misleading. The legal standards applied by the Examiner mirror longstanding Washington precedent concerning the LID assessment process; indeed, the Examiner repeatedly quoted from these cases. (CP 56, CP 66-67); *see, e.g., Abbenhaus*, 89 Wn.2d at 860-61; *Kusky*, 85 Wn. App. at 498-99; *Time Oil*, 42 Wn. App. at 480; *Cammack*, 15 Wn. App. at 197. Inherent in a hearing officer's role is the right to weigh competing evidence, including any expert testimony, and to determine the appropriate weight to be given to each submittal. *See, e.g., Friends of Cedar Park*, 156 Wn. App. at 641-42. The fact that some landowners chose to submit argument through means of an unsworn letter was properly considered by the Hearing Examiner in comparing this claimed "evidence" with the live testimony of the City's appraiser, who was subject to cross examination at the hearing. (CP 66-

67). The presumptions and standards of proof applicable to LID assessment proceedings apply automatically by operation of law, *see, e.g.*, *Abbenhaus*, 89 Wn.2d at 860-61, and no Washington caselaw holds that public notice for a final assessment hearing must include a detailed description and/or explanation of these rules. Again, the Respondents (and the trial court below), have essentially attempted to rewrite governing statutes. This Court recognizes that it is not the role of the judiciary to rewrite the work of the Legislature. *See, e.g., State v. Groom*, 133 Wn.2d 679, 689, 947 P.2d 240 (1998); *Applied Ind. Materials Corp. v. Melton*, 74 Wn. App. 73, 79, 872 P.2d 87 (1994).

5.2.6. The Hearing Examiner did not improperly consider evidence submitted after the record had closed. At the conclusion of the June 1, 2011 public hearing, the Hearing Examiner agreed to keep the written record open for an additional two week period—one week for landowners to submit further argument, and one week for the City to provide a final response. (CP 2257-58). The Examiner clarified that any post-hearing submittals were limited to responses and argument only, and that the record was closed for purposes of receiving new evidence. (CP 2258). Respondents contend that the City's June 15, 2011, written response included new "rebuttal evidence"

that the Hearing Examiner improperly relied upon in making his recommendations to the City Council. *Docken Opening Brief at 35-37.*

The Respondents do not identify this "new" evidence, much less explain the prejudicial impact from this post-hearing submittal. The record demonstrates nothing more than common trial process of response and reply. In responding to the various arguments that had been raised by landowners during and after the June 1 hearing, both the City's June 15, 2011, letter and the enclosed June 13, 2011, supplemental response from Macaulay & Associates cite exclusively to information already included in the record. (CP 1077-88). The City ultimately concurred in Macaulay's recommendation to lower the assessments against two parcels. (CP 1077, 1082, 1084-88). However, these recommendations were made in response to various landowner arguments and in order to correct later-discovered clerical errors in the Macaulay report. *Id.* Nowhere in its post-hearing submittal does the City refer to or purport to rely upon evidence outside the existing record, and there is nothing in the Hearing Examiner's report suggesting that the Examiner took into consideration extra-record

material.[8] Again, the Respondents assert an issue that they cannot support. The Court should reject these unfounded arguments.

5.2.7. The City appropriately scheduled the assessment roll confirmation and appeal hearing. Ordinance No. 11-0361 provided that any landowner seeking to challenge the Hearing Examiner's recommendations must file a written notice of appeal within 14 days of notification that the Examiner's report had been issued. (CP 1444-45). The ordinance also provided that"[w]ithin 15 days following the filing of a notice of appeal, the City Council will set a time and place for a hearing on the appeal before the City Council as soon as reasonably practicable." (CP 1445).

There is nothing in law or policy that limits the Board of Equalization's management of its process for review of the Hearing Examiner's recommendation. The City Council provided an expedited schedule for its review and notified all property owners of that schedule. (CP 1452-1461). Affected landowners' were afforded the full 14-day

[8] To the extent that the Respondents are attempting to characterize the June 13, 2011, Macaulay supplemental response itself as additional "evidence", this assertion is untenable. The Hearing Examiner's instructions regarding post-hearing written submittals nowhere purported to prohibit consideration of additional statements from the City's consultants. (CP 2257-58). Instead, the Examiner expressly allowed "any written responses or closing argument", and clarified that the City's own submittals were to "respond to any concerns or. . . arguments". (CP 2257-58).

appeal period specified by Ordinance No. 11-0361 for filing an appeal. Respondents' suggestion that the Council committed reversible error by "abbreviating" the appeal process is without merit. *Docken Opening Brief at 37-39.* The Respondents had the time established to present appeals. The administrative record and copies of the appeals were provided to the Council for review, and there is no evidence that the Council did not thoroughly review the record and the substance of the landowners' appeals. (CP 1311, 2269).

5.2.8. The time allowed for oral argument was adequate. All affected landowners were afforded the ability to present oral testimony to the Hearing Examiner without time limits during the final assessment roll proceedings. Longstanding Washington caselaw clarifies that no right of oral argument exists for quasi-judicial appeals at the administrative level unless expressly provided by statute. *See, e.g., Messer v. Snohomish County Bd. of Adjustment*, 19. Wn. App. 780, 789-91, 578 P.2d 50 (1978). By its plain terms, the statute governing Council appeals in this context does not require <u>any</u> opportunity for oral argument. *See* RCW 35.44.070. The Superior Court clearly erred in applying an unsupported, contrary legal standard when it determined that the City Council improperly limited oral argument to three minutes per landowner.

(CP 2844). The Council was not legally required to allow any oral argument, and was acting within its discretion in managing its proceedings (to limit oral argument). The trial court erred in concluding otherwise and must be reversed.

5.2.9. The City Council properly considered the appeals. The record also belies Respondents' insinuation that the Edgewood City Council's consideration of the landowners' appeals at the July 19, 2011 hearing was a predetermined sham and that the assessment roll was "summarily" approved. *Stokes/Rempel Opening Brief at 33-37.* It is undisputed that each City Council Member received copies of the administrative record and the landowners' appeals prior to the July 19, 2011 hearing. (CP 2269). Ordinance No. 11-0366 specifically acknowledged that "the Council has considered each appeal". (CP 1311). "Public officials are entitled to a presumption that they have regularly and faithfully performed their duties." *Pleas v. City of Seattle*, 112 Wn.2d 794, 815, 774 P.2d 1158 (1989) (citing 29 *Am.Jur.2d* Evidence § 171 (1967)). Where the testimony and exhibits from the hearing are available to the City Council, courts "will not presume that the council members. . . failed in their duty to become informed on the issues raised at the hearing." *State ex rel. Morrison v. City of Seattle*, 6 Wn. App. 181, 190,

492 P.2d 1078 (1971). And "due process considerations are satisfied if the City Council has available for its consideration the substance of the hearing." *West Slope Cmty. Council v. City of Tacoma*, 18 Wn. App. 328, 338, 569 P.2d 1183 (1977).

Likewise, nothing in administrative record supports Respondents' insinuation that the City Council was constrained to approve the assessment roll as recommended by the Hearing Examiner. To the contrary, the Council Members were advised at the commencement of the hearing that the Hearing Examiner's report was a recommendation; that the City Council was sitting as a board of equalization; and that the Council remained free to reduce any of the assessments. (CP 2269-70). Exercising this discretion, the Council affirmatively voted to sustain the appeal and reduce the assessment of another landowner—a result not recommended by the Hearing Examiner. (CP 2279-80, 1312). And one Council Member moved, albeit unsuccessfully, to reduce the assessment of Respondent Rempel. (CP 2308-09). The suggestion that the Edgewood Council accepted the Examiner's recommendations blindly without conducting its own thorough review of the record misrepresents the record and is a further attempt to mislead the Court. Clearly, the Council did not merely "rubberstamp" the Hearing Examiner's recommendation.

Finally, and contrary to Respondents' arguments, the City Council did not improperly "base[] its decision upon financial concerns." *Stokes/Rempel Opening Brief at 35-36.* At the conclusion of the July 19, 2011 appeal hearing, the Council received comments from the City's bond counsel regarding the legal effect of Ordinance No. 11-0366 if the enactment was ultimately adopted. (CP 2303-05). In response to Council Member questions, this discussion segued into an explanation regarding the financial consequences of postponing the Council's vote and continuing the hearing to a future date—specifically, the continued accrual of interest on the City's interim loan and the inability to issue bonds for the LID until the assessment roll had been formally confirmed. (CP 2302-21).[9] This discussion was plainly limited to the timing of the Council's vote; nothing in the transcript remotely suggests that this consideration affected any Council Member's personal determination regarding the substance of the underlying assessments or the merits of the appeals. *Id.* The Council's desire to timely conclude the hearing was entirely appropriate under the circumstances. *See, e.g., Time Oil Co.*, 42 Wn. App.

---

[9] The City's bond counsel was also serving as the City Council's attorney for purposes of the appeal and confirmation hearing, with a separate lawyer from the City Attorney's office representing staff's position. (CP 2269, 2293). Clearly the City Council was entitled to receive the advice of its attorney.

at 481 (affirming city council's denial of appellant's requested continuance where "[t]he council understandably was motivated to move the LID process to a conclusion"). The Council's separate consideration of financing concerns was not arbitrary or capricious.

5.2.10. Council Member Eidinger's vote was appropriate. At the July 19, 2011 hearing, the Respondents argued to the City Council that the City's notice of the June 1 assessment proceedings had afforded landowners insufficient time to obtain expert appraisals and prepare meaningful presentations to the Hearing Examiner. (CP 2286-89). Council Member Eidinger was originally swayed by these arguments. (CP 2301, 2311-13). Based exclusively upon his concerns regarding the timing of the hearing notice, Council Member Eidinger voted against the Council's first motion to approve the assessment roll. *Id.* Because the affirmative votes of all four participating Council Members were necessary to approve the ordinance, the motion failed. (CP 2313). After continued debate the Council voted again, with Council Member Eidinger voting with the three other Members to approve the roll. (CP 2315-2323).

Council Member Eidinger's comments and vote do not demonstrate that the Council acted arbitrarily and capriciously in confirming the LID No. 1 assessment roll. First, to the extent that the

Respondents are attempting to cite the substance of Council Member Eidinger's comments as support for their own arguments, this attempt fails as a matter of law. A party "cannot rely upon one council member's statement to show the council's intent." *Tekoa Construction, Inc. v. City of Seattle*, 56 Wn. App. 28, 35, 781 P.2d 1324 (1989). "What may have been the intent of an individual legislator may not have been the intent of the legislative body[.]" *Convention Ctr. Coalition v. City of Seattle*, 107 Wn.2d 370, 375, 730 P.2d 636 (1986). Indeed, the other Council Members expressly acknowledged that the LID process had been fair, (CP 2309-10), and Council Member Eidinger himself acknowledged that the City's hearing notice had in fact "followed the letter of the law." (CP 2301).

Second, it is clear from the hearing transcript that Council Member Eidinger's original vote against confirming the assessment roll was based on timing considerations rather than the merits of the appeals. (CP 2301, 2311-13). This procedural point is irrelevant to the underlying assessment methodology. Respondents' arguments disregard longstanding Washington law. *See, e.g.,* RCW 35.44.090; *Tiffany Family Trust*, 155 Wn.2d at 235 n.5. The timing argument was supplied to the City Council entirely by the Respondents themselves. (CP 2286-89, 1117, 1277). The

Respondents cannot now complain that Council Member Eidinger originally accepted, but upon further consideration rejected, an argument that they themselves encouraged him to entertain—and which is erroneous as a matter of law. *See, e.g., JDFJ Corp. v. International Raceway, Inc.*, 97 Wn. App. 1, 10, 970 P.2d 343 (1999) (party cannot successfully complain of rulings which he himself has invited tribunal to make).

Finally, and most importantly, nothing in the record remotely suggests that Council Member Eidinger's ultimate vote to confirm the assessment roll was based upon any improper motive or factor. His original concern was specific to procedural issues. (CP 2301, 2311-13). And while Council Member Eidinger noted that the probable affirmative vote of the absent Mayor would suffice to pass the ordinance if the matter were delayed, this factor had no bearing upon his determination regarding the merits of the appeals. (CP 2320-23).[10] Nowhere does the hearing transcript indicate that Council Member Eidinger accepted or otherwise

---

[10] This factor clearly differentiates the instant matter from *Carlson v. Town of Beaux Arts Village*, 41 Wn. App. 402, 704 P.2d 663 (1985), upon which the Respondents rely. *Docken Opening Brief at 45*. The municipality in *Carlson* had denied a proposed subdivision based upon its alleged noncompliance with the local comprehensive plan and various planning reports, none of which had been formally adopted as decisional criteria for plat approval. *Carlson*, 41 Wn. App. at 407-08. This situation is wholly inapposite to the instant LID assessment appeal.

concurred in any of the substantive challenges to the LID assessments asserted by the Respondents. (CP 2301-2323).

5.2.11. Council Member's Crowley's vote was appropriate. The Respondents also contend that the City Council acted arbitrarily and capriciously because Council Member Crowley participated in the vote to confirm the assessment roll. *Stokes/Rempel Opening Brief at 47.* The Respondents correctly note that Council Member Crowley initially made an unsuccessful motion to reduce the assessment for Respondent Rempel's property. (CP 2308-09). Because no other Council Member seconded the motion, it died automatically. (CP 2308-09). *See, e.g.,* Robert's Rules of Order Newly Rev. (10th ed.), p. 34-35. Council Member Crowley subsequently voted, together with the other Council Members, to approve the assessment roll. (CP 2322-23).

There is no legal prohibition preventing a local legislator from joining in a majority vote on a matter simply because his/her own previous motion was unsuccessful. The Respondents do not—and cannot—cite any legal authority that Council Member Crowley's participation in the assessment confirmation debate and vote was improper, much less arbitrary and capricious.

5.2.12. The City Council did not commit reversible error by voting to confirm the assessment roll without a prior motion to reconsider. Washington law is clear that a municipal governing body has the unfettered discretion to disregard previous votes until the council's desired result is obtained:

> Unless restrained by charter or statute, the legislative body of a municipal corporation possesses the undoubted right to reconsider its vote upon measures before it at its own pleasure, and to do and undo, consider and reconsider, as often as it may think proper, until a final conclusion is reached.

Cowlitz County v. Johnson, 2 Wn.2d 497, 502-03, 98 P.2d 644 (1940). Edgewood is unrestrained by charter (the City is a noncharter municipality), and no Washington statute governs this issue. The Respondents' argument that the Council did not first formally move to reconsider its original, failed motion is plain wrong.

Although a city council may adopt its own rules of parliamentary procedure, *see* RCW 35A.12.120, those rules exist exclusively for the council's own convenience and may be abolished, suspended, modified, or waived at the council's pleasure. *See, e.g.,* 4 McQuillin, *The Law of Municipal Corporations* § 13.62 (3d ed. 2011). A council may likewise

waive its own rules by implication where a vote was not made in accordance with a particular rule. *Id.*

Respondents also cite no authority indicating that a local legislative body's internal rules of procedure may be enforced by outside parties in the first instance. Indeed, only members of the body itself may enforce these rules by raising a point of order or appealing. *See* Robert's Rules of Order Newly Rev. (10th ed.), p. 242-43. And any such procedural challenge "must be raised promptly at the time the breach occurs." *Id.* at p. 243. "After debate on such a motion has began—no matter how clearly out of order the motion may be—a point of order is too late." *Id.* This principle is fatal to Respondents' arguments, as no City Council Member objected to the Council's second motion approving the assessment roll during the July 19, 2011 meeting. (CP 2322-23). The Council adopted the roll, as modified by the Council, without procedural objection from its membership. There is no error in that process.

It is a longstanding principle that a reviewing court should not elevate form over substance in this context:

> The action of municipal bodies exercising legislative functions should not be overthrown upon technical rules or strict construction of parliamentary law where the facts of such action can be gathered from the

> record. The validity of such action will be upheld by the language of the proceedings of the meetings if it is fairly susceptible of such construction . . . *Mere failure to conform to parliamentary usage will not invalidate the action when the requisite number of members has agreed to the particular measure.*

McQuillin, *supra*, *The Law of Municipal Corporations* § 13.63 (emphasis added). *See also,* RCW 35A.12.160 (forms of ordinances not controlling). The Respondents cannot invalidate the City Council's vote to confirm the assessment roll on this basis.

5.2.13. Summary regarding procedural arguments. Although the Superior Court's decision is not technically under review in this appeal, the Superior Court's reasoning underscores how sharply the court departed from Washington law in ruling against the City. E.g.:

> Fifteen days may be adequate notice under the statute, but it's insufficient notice for a taxpayer to hire an independent appraiser and complete a report evaluating a parcel's value with and without the sewer being added as a value-added item.

(CP 2829-30).

In identifying various "errors" in the City's decisional process, the Superior Court either misconstrued State law or subordinated the

Legislature's decisions to the court's own subjective standards. The 15-day deadline for providing notice of a final assessment hearing is plainly codified at RCW 35.44.090. (In addition to the long-standing LID process, the City actually notified landowners 41 days in advance of the June 1, 2011 hearing.) The statute contains no exception for the alleged difficulty of LID participants to secure competing appraisals, a longstanding requirement for successful assessment challenges. *See, e.g., Kusky*, 85 Wn. App. at 499; *Bellevue Associates*, 108 Wn.2d at 676-77. The statute prescribing the content of prehearing notices likewise requires no "advance warning" regarding the evidentiary presumptions and burdens of proof applicable during the proceedings. *See* RCW 35.44.080. These presumptions, together with the necessity of live expert testimony, have been a fundamental aspect of the final assessment legal framework for several decades and were properly applied by the Edgewood Hearing Examiner. *See, e.g., Abbenhaus,* 89 Wn.2d at 861; *Indian Trail*, 35 Wn. App. at 842-43; *Cammack*, 15 Wn. App. at 197; *Time Oil Co.*, 42 Wn. App. at 489-80; (CP 66-67).

Washington courts have repeatedly affirmed that the statutory timeframes for the LID process satisfy relevant constitutional standards. *See, e.g., Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 235

n.5, 119 P.3d 325 (2005) (citing cases). In disregarding this well-established body of law, the Superior Court essentially legislated from the bench.[11] The Respondents' various procedural arguments now ask the Court of Appeals to adopt the same erroneous approach. This Court should decline the opportunity.

5.3. The City's Appraisal Methodology Was Correct.

The numerous arguments the Respondents raise against the City's assessment methodology are likewise without merit. The City's assessment roll for LID No. 1 was supported by an extensive, detailed appraisal analysis in challenge to which the Respondents have offered no contrary expert appraisal testimony. Their substantive arguments regarding the City's valuation approach should be rejected as a matter of law.

5.3.1. The Respondents have produced no expert appraisal testimony sufficient to challenge the City's special benefits methodology. Before addressing the merits of Respondents' arguments, it is critical preliminarily to note the lack of any meaningful expert appraisal

---

[11] The Superior Court similarly erred by concluding that the appealing landowners were each entitled to a 20 minute opportunity for oral argument during the administrative appeal process—a standard that has absolutely no basis in Washington law and which was apparently manufactured by the court out of whole cloth. (CP 2880-81). *See, e.g.*, RCW 35.44.070; *Messer*, 19. Wn. App. at 789-91.

testimony in the administrative record that substantiates their various challenges to the City's assessment methodology. Washington law is clear that the extent of special benefit in this context is a question of fact to proven by expert testimony. *See, e.g., Kusky*, 85 Wn. App. at 499; *Bellevue Associates*, 108 Wn.2d at 676-77; *Indian Trail*, 35 Wn. App. at 842-43. It is equally well-established that such testimony must provide before-and-after values in order to successfully challenge an assessment. *Time Oil*, 42 Wn. App. at 480; *Cammack*, 15 Wn. App. at 197. None of the Respondents have produced any expert testimony satisfying this standard.

Although Respondents cite extensively to the June 1, 2011, declaration of John Trueman, *see Docken Opening Brief at 53-55*, their reliance upon this cursory, two-page, document is misplaced. The declaration is not, and does not purport to be, a professional real estate appraisal. Mr. Trueman likewise did not testify or otherwise avail himself to cross-examination at the final assessment hearing, and the substantive assertions in his declaration were refuted by Mr. Macaulay's hearing testimony. (CP 66, 2244-49). And as the Hearing Examiner correctly noted, the declaration specifically does not contain a "with and without" valuation of any of the affected parcels within the LID. (CP 66, CP 802-

03). Accordingly, as a matter of law it does not constitute sufficient appraisal evidence regarding special benefits to successfully challenge the City's assessments. *See, e.g., Time Oil Co.*, 42 Wn. App. at 479-80.

The content of the Trueman declaration is also refuted by the record below. Although Mr. Trueman opines that a "before and after" analysis is required for the City's assessment process (CP 803), he himself does not present one. The Macaulay report contains precisely the required analysis—at great length and in great detail. (CP 1537, 1482-87). The Trueman declaration also asserts that Macaulay & Associates failed to clearly consider the "physical condition, locality and environment of the property involved, and the character of any improvements." (CP 803). But, the Macaulay report stated that the exterior of each property was physically inspected. (CP 1465.) And as described in the "Basis of Valuation" section of the Macaulay report, highest and best use, land-to-building ratios, physical condition of improvements, location and environmental characteristics of each property were all considered in the valuation calculus. (CP 1537-44.) The Macaulay report also contains a detailed description of the properties located within each relevant zoning district. (CP 1544-57). The Trueman declaration's assertion to the contrary is false. Mr. Trueman erroneously opines that there is no way to

reasonably conclude that the sewer improvement is a special benefit or that the amount of the assessments are proportional. (CP 803). In fact, the Macaulay report provides a lengthy, detailed explanation of the special benefit analysis and how the recommended assessments are proportionally distributed. (CP 1537-44). And the overwhelming record evidence demonstrates that the sewer system would specially benefit the affected parcels by facilitating a much more intensive level of land use development. (CP 1466-68, CP 2126-29, CP 2248-49). Finally, the Trueman declaration states that the Macaulay report does not include "appraisal evidence showing how and the amount to which the properties would be benefited." (CP 803). This statement is also incorrect, as Macaulay listed numerous property sales which form the basis of the report's fair market value analysis. (CP 1565-78).

Ultimately, the Hearing Examiner correctly determined that the Trueman declaration was outweighed by the far more detailed and substantial Macaulay report. There are facts sufficient to support that determination, and that of the Board of Equalization.

5.3.2. The City's appraisal methodology appropriately considered the impact of the City's recent zoning amendments. The record is replete with statements acknowledging that land use

development potential in Edgewood has been historically constrained by the lack of sanitary sewer infrastructure. (CP 1518, 1514-17). Indeed, the City's recent zoning amendments were made in anticipation of the new sewer system, and "[i]n all probability. . . would not have been put into place without the LID project." (CP 1518). The Macaulay report specifically noted that "[n]ot only is more intensive development now allowed (with sewer service)", but also that "it is important to note that a number of uses permitted prior to the revisions could not be achieved without sewers." (CP 1465). The report further elaborates:

> Special benefit accrues to affected properties due to the project by enhancing the entire vicinity's reputation, aesthetic appeal and character, and creating a more desirable location for commercial property owners and tenants as well as for residential property owners. Recent changes in development standards with the project in place include much higher allowable density and increased height in the Mixed Use Residential, Commercial and Town Center zones. This will allow for more intensive future development since the land use designation changes cannot be implemented without sewer service. Furthermore, significant development capacity which was allowed under the prior zoning regulations could not be utilized without sewer service.

(CP 1466) (emphasis added).

Macaulay acknowledged—correctly—the enhanced development potential accruing to properties within the LID as a result of the City's recent zoning changes, and a significant portion of the Macaulay report is devoted to analyzing these changes within the larger framework of the City's land use regulations. (CP 1518-1525). But Respondents' suggestion that Macaulay inappropriately imported "general" benefits from these land use amendments into the special benefit analysis is incorrect. For purposes of the appraisal process, the Macaulay report clarified that "*the newly enacted zoning requirements are in place both without and with the LID project*", and that "highest and best use and potential intensity of use in the area significantly increase *due to the infrastructure improvements.*" (CP 1518 (emphasis added)). This approach is entirely consistent with Washington law. *See, e.g., Little Deli Marts, Inc. v. City of Kent*, 108 Wn. App. 1, 7 , 32 P.3d 286 (2001) ("Special benefits include the 'opportunity to benefit' so long as the opportunity is not speculative").

Doolittle v. City of Everett, 114 Wn.2d 88, 90, 786 P.2d 253 (1990) is factually inapposite. There, the challenge was to the method of assessment for contiguous parcels owned by the same party but separately improved and used. *Doolittle*, 114 Wn.2d at 90. The *Doolittle* Court

noted that if the lots in question were ultimately aggregated in the future, part of the resulting increase in value would result not only from the underlying public improvement (a road-widening project) but also from the lot aggregation. *Id.* at 103. The Court concluded that the City's assessment methodology, which had valued the land as a single, combined parcel, disregarded the landowner's actual use and future intent with respect to the property and was fundamentally flawed. *Id.* at 91-92, 103.

Unlike the speculative, future potential for a lot aggregation at issue in *Doolittle*, it is axiomatic that the zoning designation and land use constraints applicable to a particular parcel are relevant factors in an appraisal. *See, e.g., Bellevue Plaza,* 121 Wn.2d at 404; *Tiffany Family Trust, supra.* The Macaulay report properly considered the impact of the City's recent zoning amendments in appraising the parcels within LID No. 1. Nowhere does the report suggest that "general" benefits from these legislative enactments were inappropriately considered.

5.3.3. The City's appraisal methodology included a correct valuation date for the assessed parcels. For over 100 years, Washington courts have consistently defined a "special benefit" in the assessment context as the valuation difference accruing as a result of the underlying public improvement:

> The amount of special benefits attaching to the property, by reason of the local improvements, is the difference between the fair market value of the property immediately after the special benefits have attached, and the fair market value of the property before the benefits have attached.

McMillan v. City of Tacoma, 26 Wash. 358, 361, 67 P. 68 (1901) (emphasis in original). The terms "with and without" and "before and after" are equivalent and interchangeable in this context. *See, e.g., Tiffany Family Trust*, 155 Wn.2d at 231; *In re Westlake Ave.*, 40 Wash. 144, 150, 82 P. 279 (1905); *Hansen v. Local Imp. Dist. No. 335*, 54 Wn. App. 257, 262, 773 P.2d 436 (1989). The fair market value estimation is thus not simply a temporal measure—it is instead a measure of the fair market value with the influence of the underlying improvement and without the influence of that improvement. *Id.*

Performing two appraisals without reference to a fixed time is also potentially misleading because there would be no compensation for the intervening time value. For example, an appraisal performed as of May 2008 (prior to formation of LID No. 1) and an appraisal performed as of March 2011 (when the City's sewer project was substantially complete) could not be reasonably compared to estimate special benefits since the market was obviously influenced by other factors (e.g., economic

conditions, land inventory fluctuations, zoning amendments, etc.) during the intervening three year period. Respondents' arguments to the contrary misrepresent the purpose and effect of the LID appraisal process and disregard the explanation set forth in the Macaulay report itself.

Macaulay & Associates explained and summarized its methodology for determining special benefits to emphasize the "with and without" approach:

> A special benefit is defined as a specific, measurable increase in value of certain real property in excess of enhancement to the general area (and benefitting the public at large) due to a public improvement project. It is measured as the difference, occurring by reason of the LID project, between the market value of each parcel studied, without the LID project, and market value of the same parcel with the LID project completed and as of the same time frame. For this analysis, the date of valuation is May 10, 2011.

(CP 1528).

This methodology tracks Washington law with respect to the appropriate calculation of special benefits. In the context of the City's sewer system and LID No. 1, the Macaulay report's use of a "with and without" approach represents a clearer and more accurate explanation of the required analysis than the "before and after" phraseology occasionally

used by the courts. The terminology difference is immaterial. There was no "fundamentally wrong basis." To the contrary, the appraisal of the special benefit assessments followed the law. The appraisal supports determination of the Board of Equalization. There is no basis for challenge and this Court should affirm the City's actions.

5.3.4. The sizing of the City's sewer infrastructure did not impermissibly impose general benefit expenses to landowners within the LID. The so-called "oversizing" theory is irrelevant to the special benefit analysis that governs the assessment process. As the City's engineering consultant explained, the LID No. 1 sewer project is the first component of the City's sewer system, and it would necessarily be required to foresee and accommodate future connections by other landowners outside the LID. (CP 2236). The consultant clarified, however, that this accommodation would have little or no impact upon the overwhelming majority of expenses incurred for the project, including the lengthy planning and specification components. (CP 2237). And the percentage difference in the actual construction expense was, as the City's consultant testified, likewise minimal—i.e., "single digits". (CP 2237). The Respondents' claim that the City "oversized" the system is irrelevant to the special benefit analysis that governs the assessment process.

The oversizing issue is a practical reality that the first component of a larger utility system must often absorb a comparatively higher percentage of the total system costs in relation to components that may be connected or added in the future. The actual effect—if any—of the alleged oversizing is grossly overstated by the Respondents. And, if there are properties that should have been included within the LID, that challenge should have been brought (if at all) after formation of the LID. *See* RCW 35.43.100 (any suit to challenge any part of LID must be brought within 30 days of formation ordinance)). The record contains no competent evidence to overcome the expert appraisal testimony that the properties were in fact specially benefited at a level significantly exceeding the amount of assessments. There is no contrary expert testimony that any of the resulting appreciation in property values was due to general benefits; indeed there is no competent testimony demonstrating the existence of any general benefits within the City's appraisal analysis. The Respondents' arguments on this point should be rejected.

5.3.5. The City's valuation methodology was correct. The use of a mass appraisal special benefit analysis, rather than a parcel-specific approach, is well supported. (CP 1465-66, 1537-38). The appropriateness of this method under the circumstances of the City's area-

wide sewer project was explained in the Macaulay report (CP 1526, 1529-30, 1534, 1538); reiterated by live expert testimony at the final assessment hearing (CP 2126-29, 2241-2255); and confirmed by the Edgewood City Council as required by RCW 35.44.070. (CP 1311). And although the Respondents decry the fact some of Macaulay's supporting documentation was contained in separate files and spreadsheets rather than the final special benefits report itself, (*see Docken Opening Brief at 55-58; Stokes/Rempel Opening Brief at 45-48),* they are unable to cite any professional standard demonstrating that this approach constitutes "fundamental error" as required by the applicable standard of review. The Macaulay Report complied with USPAP; no other evidence in opposition even sought to comply with USPAP.

The Respondents' reliance upon *Bellevue Associates v. City of Bellevue*, 108 Wn.2d 671, 7441 P.2d 993 (1987), in this context is curious. *Docken Opening Brief at 58, 60.* The Supreme Court in *Bellevue Associates* affirmed the assessment methodology at issue, and the

purported quotations supplied by the Respondents are not found in that case. *Docken Opening Brief at 58, 60.*[12]

Moreover, although the Respondents allege that the City failed to distribute the LID costs proportionately in accordance with State law, the only evidence cited for this proposition is a selectively-quoted statement from one of the Edgewood City Council Members during the confirmation proceedings. *Docken Opening Brief at 70-71.* The Respondents wholly ignore the detailed explanation of the City's assessment methodology in the Macaulay report, and their reliance upon the comments of a single Council Member is unpersuasive as a matter of law. *See, e.g., Tekoa Construction,*, 56 Wn. App. at 35; *Convention Ctr. Coalition*, 107 Wn.2d at 375. And, that same Council Member also publicly acknowledged the fairness of the City's assessment methodology. (CP 2309). The record

---

[12] To the extent that Respondents may have intended to cite an entirely different case, *Bellevue Plaza, Inc. v. City of Bellevue,* 121 Wn.2d 397, 851 P.2d 662 (1993), that decision is inapposite. The municipality in *Bellevue Plaza* had utilized an unaccredited "vehicle trips" formula to determine the special benefits accruing to properties within a street improvement LID. *Bellevue Plaza*, 121 Wn.2d at 400-02. The municipality's own expert admitted that this approach was not an appraisal method and that he had not even addressed the issue of assessment methodology. *Id.* at 414. The landowners also presented their own expert appraisal evidence challenging the formula. *Id.* 414, 418. *Bellevue Plaza* is clearly distinguishable from the instant case, where the uncontroverted expert testimony demonstrates that the mass appraisal methodology set forth in the Macaulay report is both compliant with relevant appraisal standards and appropriately utilized in the context of the City's sewer project.

amply demonstrates that the assessments were in fact distributed in proportion to the special benefits from the sewer project accruing to the affected parcels within the LID. (CP 1529-30).

5.3.6. The City's assessment methodology was explained and adequately described in the Macaulay report. Citing RCW 35.44.047, the Respondents correctly acknowledge that cities may utilize an assessment methodology different from the historical "zone and termini" approach set forth at RCW 35.44.030 -.045. *Docken Opening Brief at 63-64.* RCW 35.44.047 specifically authorizes this option:

> Notwithstanding the methods of assessment provided in RCW 35.44.030, 35.44.040 and 35.44.045, the city or town may use any other method or combination of methods to compute assessments which may be deemed to more fairly reflect the special benefits to the properties being assessed. The failure of the council to specifically recite in its ordinance ordering the improvement and creating the local improvement district that it will not use the zone and termini method of assessment shall not invalidate the use of any other method or methods of assessment.

The Respondents nevertheless contend that the City erred by not making a specific finding that the mass appraisal methodology used in the Macaulay report "more fairly reflects the special benefits to the properties

being assessed" as required the statute. *Docken Opening Brief at 63-64.* They also argue that the City presented no evidence demonstrating that Macaulay & Associates' assessment approach met this standard. *Id.*

These arguments fail on both legal and factual grounds. RCW 35.44.070 contains no requirement that the City produce evidence supporting its chosen assessment method. Irrespective, the Macaulay report contains a lengthy explanation of the mass appraisal methodology and an explanation of why it is particularly appropriate for the City of Edgewood's sewer LID. (CP 1526, 1529-30, 1534). Mr. Macaulay also testified at length during the June 1 hearing regarding the propriety of this approach under the circumstances. (CP 2126-29, 2243-2255). This explanation significantly exceeds the relevant legal standard. *See, e.g., Hansen v. Local Improvement Dist. No. 335*, 54 Wn. App. 257, 260-62, 773 P.2d 436 (1989) (only slight evidence necessary for city to justify its chosen method of assessment). Finally, the Respondents' contention that the City Council failed to make a finding in support of the Macaulay report's assessment methodology is simply untrue. In confirming the assessment roll for LID No. 1, Ordinance No. 11-0366 specifically addressed this point:

> [I]n accordance with RCW 35.44.047, the City Council concurs in the special benefits appraisal and assessment methodology utilized by Macaulay & Associates and deems this methodology to more fairly reflect the special benefits to the properties being assessed[.]

(CP 1311). The Respondents' arguments disregard this record information and (again) seek to misrepresent the record to this Court.

5.3.7. The City's valuation methodology was not based upon speculation. Macaulay & Associates performed significant market research for the relevant vicinity and the surrounding market areas. (CP 1533-34). Due to the economic recession and decreases in market activity, this market research was expanded to a larger area and to sales transactions dating back to 2004. (CP 1533, 1565-77). Probable market projections based on recent trends and evidenced by completion of similar LID projects were described in both the "Scope of the Study" and "Basis of Valuation" sections of the Macaulay report. (CP 1533-34, 1537-44). Market projections were based upon the aforementioned sales research, various market data publications and extensive interviews with local real estate professionals familiar with Edgewood and surrounding areas. *Id.* The report also included discussion of various other completed LID projects in order to illustrate the creation of special benefits due to similar

projects. (CP 1539-40). The record accordingly demonstrates that the City's special benefit study was amply supported by research and was not speculative.

5.3.8. The Macaulay report complied with applicable appraisal standards governing "highest and best use" of the underlying properties. The record likewise refutes the Respondents' contention that the Macaulay report violated appraisal industry standards governing "highest and best use" analysis. *Docken Opening Brief at 67-70.* Pursuant to Uniform Standards of Professional Appraisal Practice Standard Rule 6-8 (n)[13], "when an opinion of highest and best use, or the appropriate market or market level was developed, [the appraiser must] discuss how that opinion was determined". The immediately following comment for this standard clarifies that:

> The mass appraisal report must reference case law, statute, or public policy that describes highest and best use requirements. When actual use is the requirement, the report must discuss how use-value opinions were developed. The appraiser's reasoning in support of the highest and best use opinion must be provided in the depth and detail required by its significance of the appraisal.

---

[13] Available at http://www.uspap.org/.

Contrary to the Respondents' assertion, the Macaulay report clearly complies with this standard by defining highest and best use by quoting an accepted appraisal treatise (*The Appraisal of Real Estate* (13th ed. 2008)), describing highest and best use in the valuation process, and discussing valuation based on zoning and land use regulations both without and with the LID improvements. (CP 1527, 1537).[14]

5.3.9. The Pierce County Buildable Lands Report does not contradict the Macaulay report. Pierce County issued a Buildable Lands Report in 2007. By its terms, the Buildable Lands Report is an

---

[14] The Respondents retreat into absurdity in suggesting that Macaulay report violated governing appraisal standards by failing to discount property values by the amount of the City's own LID assessment. *Docken Opening Brief at 69-70.* The applicable USPAP Standard Rule in this context is 6-2(g). The reference to "special assessments" in this standard is obviously intended to mean pre-existing assessments rather than the proposed LID assessment itself. The Macaulay report assumes property to be unencumbered and owned fee simple for its special benefit analysis and values each parcel "as is" with and without the LID in place as of the same date. At the time of the valuation, the recommended LID assessments are not yet attached to the underlying property and should not be considered. While pre-existing special assessments against the subject parcels would be properly considered, similarly including a discount for the proposed assessment under the LID would severely distort the determination of fair market value in the "with" condition.

Moreover, the scope and purpose of the special benefit/proportionate assessment study is to estimate special benefit to the affected properties, to prepare an assessment roll spreadsheet based on the project cost, and to proportionally allocate the special benefit and assessment amounts to the properties within the LID boundary. To then discount the property value, as the Respondents suggest, would create a fundamentally wrong market valuation estimate and negate the entire purpose of the special benefit analysis. The Respondents' argument on this point is nonsensical.

area-wide, county planning document. It was prepared for an entirely different purpose than the LID No. 1 special benefit analysis. (CP 1259-64). It is not an appraisal of special benefits. And despite the Respondents' characterization of the Building Lands Report as "the City's own" report, *Docken Opening Brief at 75*, there is no record evidence indicating that the City has adopted this document (the record merely contains a few oblique references in a staff report for the City's 2009 Comprehensive Plan amendments.) (CP 1260-64). The information in the report is based upon criteria that are largely irrelevant to the appraisal methodology utilized by Macaulay & Associates, and the document contains no parcel-specific appraisal analysis. Finally, the Buildable Lands report was prepared in 2007—four years before the Macaulay report, and is obviously outdated in comparison. *Id.* The Building Lands Report does not demonstrate that the City's assessments were made on a fundamentally wrong basis.

5.3.10. The Macaulay report appropriately considered build-out. A proper assumption utilized in the Macaulay report is that "with the project in place, recently enacted changes to allowable development density and various dimensional requirements for the zoning categories affecting the subject vicinity were approved. . . ." (CP 1479).

The recent amendments to the City's land use regulations and comprehensive plan were in response to the availability of sewer service which will physically allow more intensive development. Macaulay & Associates' analysis of the affected LID parcels considered "market densities" and probable development based on recent market trends. Contrary to the Respondents' assertion, the report does not rely solely on the maximum density allowed by the City's amended zoning regulations. (CP 1533-34, 1570). And, the report considered various land, useable and unusable. The Respondents' selectively quoted text from the Macaulay report does not support their contention regarding what lands Macaulay did or did not consider. *Docken Opening Brief at 80.* (CP 1552, 1554-55). Further, Respondents' assertion that Macaulay's analysis does not assume "reasonable limiting factors" is also false. *Docken Opening Brief at 80.* The limiting factors for the City's special benefit study are clearly identified in the Macaulay report. (CP 1537-44). The Court will not find any "fundamentally wrong basis" in the report or in the City's confirmation of the final assessment roll.

5.3.11. The Zacharia testimony was appropriate. The testimony at the hearing included that of Macaulay & Associates appraiser trainee Ashley Zacharia. Respondents grasp at straws in asserting that this

testimony was improper. The introductory letter presenting and immediately preceding the Macaulay report formally disclosed that "Ashley Zacharia, appraiser trainee, provided assistance in preparation of the report and analysis." (CP 1467). Although Ms. Zacharia's participation was not separately acknowledged in the appraisal's certification, her participation was reported and disclosed. (CP 1467). The Respondents are unable to demonstrate that the underlying assessments were made on a fundamentally wrong basis as a result of this disclosure.

5.4. The Respondents' Parcel-Specific Arguments Are Without Merit.

The parcel-specific arguments asserted by the various Respondents share two overriding and ultimately fatal defects. *Docken Opening Brief at 84-100; Stokes/Rempel Opening Brief at 17-26.* First, they lack the benefit of any supporting expert appraisal testimony containing "with and without" valuations as required by Washington law. Second, the arguments ask this Court to substitute its judgment of fact for the Board of Board of Equalization.

The record is clear in this matter that there is no competing appraisal testimony. In the absence of such testimony, the City does not

even have to rely on the Macaulay report. It is Respondents' burden to show with competent evidence the lack of special benefit. *See, e.g., Time Oil Co.,* 42 Wn. App. at 479-80*; Indian Trail Trunk Sewer*, 35 Wn. App. 840, 842, 670 P.2d 675 (1983); *Cammack*, 15 Wn. App. at 197. Several of the Respondents purport to rely upon the Trueman declaration, but—as explained *supra*—this declaration is not an appraisal of any parcel. Mr. Trueman offers a few select criticisms of the Macaulay report, but provides no opinion regarding the special benefits in the context of any particular LID parcel. (CP 802-03). He also did not testify in person or make himself available to cross-examination at the final assessment hearing. Thus, as the Hearing Examiner correctly determined, the Trueman declaration is insufficient as a matter of law to overcome both the presumptions in favor of the City and the specific appraisal opinion of special benefits contained in the Macaulay report.

Second, and more fundamentally, the Respondents' arguments reach far beyond the propriety of the assessment roll confirmation process and invite the Court of Appeals to conduct an independent evaluation of the merits with respect to each affected parcel. As such, they exceed the scope of the Court's review in this appeal. *See, e.g., Abbenhaus*, 89 Wn.2d at 860-61 (reviewing court only undertakes a "consideration and

evaluation of the decision-making process", and does not independently consider the merits); *Hansen*, 54 Wn. App. at 260 (court's review "is limited to assessing the propriety of the process and does not permit an independent evaluation of the merits").

Finally, many of the Respondents' "parcel-specific" theories simply attempt to recycle their general arguments concerning notice of the final assessment hearing *(Docken Opening Brief at 91-92)*, the Trueman declaration (*id. at 84-85, 94)*, the "highest and best use" standard employed by the City's appraisal consultant (*id. at 89-91),* and similar matters. These arguments have been addressed by the City. The Court will recognize that the extent of Respondents' briefing is an attempt to mask the lack of any merit to their appeals. Nevertheless, the City briefly addresses the individual parcel claims.

5.4.1. Schmidt/Masters (LID Parcel Nos. 71 and 79). Respondents Schmidt/Masters unpersuasively contend that the Macaulay report erred by failing to deduct the probable cost of developing their property. *Docken Opening Brief at 86-89.* As a matter of common sense, all property necessarily requires the expenditure of funds before it can be meaningfully developed. These costs should be reflected in the parcel's fair market value since a willing buyer and a willing seller would take

them into account when establishing a fair sales price. It is a truism that construction of a side sewer would be necessary in order for the Schmidt/Masters parcel to connect with the new sanitary sewer system And, of course, without the City sewer, the property could not develop to approved densities. Further, there is no evidence that the resulting development expense would be extraordinary or that such costs are excluded from the market price of comparable properties. For this reason, Respondents' reliance upon *Kusky v. City of Goldendale* is misplaced. *Kusky*, 85 Wn. App. at 499-501 (sustaining assessment challenge where landowner presented parcel-specific, expert appraisal testimony regarding countervailing property costs). The Respondents' argument on this point fails to demonstrate a fatal, fundamental flaw in the City's assessment methodology.

5.4.2. Suelo Marina, LLC (LID Parcel 31). Respondent Suelo Marina, LLC relies upon the Pierce County Assessor's valuation of the subject parcel to contend that Macaulay's lower valuation estimate is erroneous. *Docken Opening Brief at 84-86.* The reason for this disparity is unclear from the record. (The fact that the Assessor's valuation is higher than Macaulay's report may be due to the fact that Macaulay appraised the land value alone, whereas the Assessor may have given

some value to the 1745 square foot structure located on the property.) In any event, the record is devoid of the actual Assessor's documents and thus there is no basis to determine if there is another reason for the difference. Given the more detailed approach of Macaulay's appraisal, the Hearing Examiner and City Council were justified in affording more weight to the Macaulay report.

5.4.3. Acosta (LID Parcel No. 128). Respondent Acosta claims that the Macaulay report is flawed because of its alleged failure to properly apply the "highest and best use" standard. *Docken Opening Brief at 89-91.* As explained *supra*, this contention is erroneous. The Macaulay report clearly acknowledged and applied this standard by reference to a well-established professional treatise. (CP 1527, 1537). And contrary to the Respondents' assertions, the Macaulay report did not purport to predict what specific development would ultimately occur on the subject property. *Docken Opening Brief at 90.* Rather, Macaulay established special benefit by comparing the sales price of similar zoned property with and without the influence of the LID. The Respondents have not—and cannot—demonstrate that the City's assessment approach was fundamentally flawed.

5.4.4. Duncan (LID Parcel No. 2). Respondents Duncan assert that the City wrongly assumed that their property was actually larger than shown on some county records. *Docken Opening Brief at 93.* This issue was thoroughly addressed at the final assessment hearing by the City's consulting engineer, who testified that conflicts existed between records maintained by the Pierce County Assessor and the Pierce County Auditor. (CP 2231-33). He clarified that the City had utilized the county metadata and GIS files, which are the most accurate, for the purpose of establishing property sizes in the Macaulay report. *Id.* This information was unrebutted, and therefore it was appropriate for the Hearing Examiner to base his recommendation upon this data. (CP 59-60).

The Respondents also identify several alleged development constraints on the property. *Docken Opening Brief at 93.* However, while each property may have unique limiting characteristics, there is no evidence that the subject property is any more or less typical than any other property in the LID, and certainly no parcel-specific, expert appraisal evidence as to the monetary cost by which these alleged constraints would affect fair market value. The Respondents have presented no expert evidence demonstrating that the City's assessment was fundamentally wrong or arbitrary and capricious.

5.4.5. Skarich (LID Parcel No. 115). Respondent Skarich's primary argument emphasizes the differences between the original preliminary, 2008 assessment of the subject property and the 2011 the Macaulay report. *Docken Opening Brief at 97-100.* This theory is without merit. A preliminary assessment is prepared for purposes of forming an LID and is not binding with respect to the final assessment. *See* Chapter 35.43 RCW and Chapter 35.44 RCW. Washington courts have routinely upheld final assessments that significantly exceed the amount of the preliminary assessments in this context. *See, e.g., In re Ron Inv. Co.*, 43 Wn. App. 860, 863, 719 P.2d 1353 (1986) (affirming final assessment more than five times greater than preliminary assessment). Because the Respondent offered no expert testimony on the issue of special benefits as of 2011, this argument fails as a matter of law.

5.4.6. Rempel (LID Parcel No. 68). Without the benefit of any supporting expert testimony, Respondent Rempel speculates that perceived discrepancies with surrounding property values are attributable to Macaulay's alleged error on the split-zoning of the subject property. *Stokes/Rempel Opening Brief at 26-26.* While it is true the subject property is not split-zoned, Mr. Macaulay testified there was a greater value placed on the Meridian frontage portion of the property, as if the

property zoning was different. (CP 2253). Respondent Rempel compares land values with neighboring properties, including LID Parcel Nos. 79 and 81. *Stokes/Rempel Opening Brief at 24-26.* However, the zoning map for Local Improvement District No. 1 shows that the Rempel property is much longer and thus the rear of the property is much further away from the main thoroughfare of Meridian Avenue. (CP 1354-55). Comparison with Parcel No. 84 is relevant since it is a long parcel with limited frontage on Meridian, and this factor supports the Macaulay analysis.

5.4.7. 1999 Stokes Family LLC (LID Parcel No. 27).

Respondent Stokes contends that Macaulay & Associates used a flawed analysis in relation to the amount of special benefit accruing to the MR-2 zoned portion of the subject property. *Stokes/Rempel Opening Brief at 17-22.* The City provided testimony regarding the use of the charts referenced in Respondent's brief and how the indicated value ranges applied to parcels that were entirely zoned as such. (CP 2249-51). The Stokes property is split-zoned, and the relevant hearing testimony explained that valuations of split zoned property are not simply an aggregation of the separate values for the different zones. (CP 2251). The property is instead valued as a whole rather than on a piecemeal basis. *Id.* Respondent Stokes emphasizes the perceived discrepancies between a

worksheet for the property showing certain dollar figures for the subject property and Macaulay's final conclusions. Mr. Macaulay, however, addressed this point on cross examination: "You know, oftentimes, like I said, these worksheets aren't the total story behind the different ways we looked at property and ultimately what we came up with, so it's just a summation of how we did things." (CP 2217).

Respondent Stokes points to other parcels, but does not present any expert testimony supporting claims of comparability or disparity. Accordingly, any such evidence is insufficient as a matter of law to overcome the City's assessment. *See, e.g., Time Oil Co.,* 42 Wn. App. at 479-80*; Indian Trail*, 35 Wn. App. at 842; *Cammack*, 15 Wn. App. at 197. And, as the record demonstrates, the Stokes property is factually dissimilar from the two other parcels zoned MR-2 within the LID No. 1 boundary. Both of the other parcels (Parcel Nos. 34 and 75) are landlocked and are located much further from Meridian Avenue. Ultimately, every property is somewhat unique, and it is pure speculation as to whether the alleged differences in value are the result of some flawed appraisal process or an arbitrary conclusion. The City heard and considered these arguments, and sitting as a Board of Equalization, made its determination in light of the strength and weakness of that evidence.

There was no error, and the Court should affirm the City's determination based on the Board of Equalization as fact-finder (and not on the erroneous approach by the trial court).

VI. CONCLUSION

Under the governing standard of review, the Court of Appeals may sustain the instant appeals only if the Respondents have demonstrated that the City's assessment methodology was fundamentally flawed or that the City acted arbitrarily and capriciously in confirming the assessment roll. The Respondents have not met this demanding standard. All of their substantive and procedural arguments should be rejected by the Court. The City's confirmation of the final assessment roll for Local Improvement District No. 1 was procedurally and substantively correct as a matter of law and should be upheld.

In ruling against the City below, the Superior Court did not acknowledge—much less apply—the controlling statutes and legal standards for judicial review of an LID assessment appeal. Instead, the court substituted its judgment for that of the Legislature. The Superior Court's decision was clearly erroneous and should be reversed. The City's assessment roll for LID No.1, as approved by the Board of Equalization, should be confirmed.

Dated this 15th day of June, 2012.

J. Zachary Lell, WSBA #28744
Wayne D. Tanaka, WSBA #6303
Attorneys for Appellant City of Edgewood

I, Gloria J. Zak, declare as follows:

1. I am a citizen of the United States, a resident of the State of Washington, and an employee of Ogden Murphy Wallace, P.L.L.C.

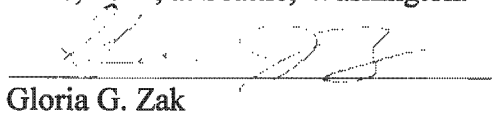
2. On June 13, 2012, I filed the **Opening Brief of Appellant City of Edgewood** and this Declaration of Service with the Court of Appeals, Division II, and served a copy of said documents via First Class U. S. Mail on the following Respondents.

Margaret Archer
GORDON THOMAS HONEYWELL, LLP
1201 Pacific Avenue, Suite 2100
Tacoma WA 98401
marcher@gth-law.com

Carolyn A. Lake
GOODSTEIN LAW GROUP, PLLC
501 S. G Street
Tacoma WA 98405
clake@goodsteinlaw.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 13 day of June, 2012, at Seattle, Washington.



Gloria G. Zak